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No. 81-2110

IN THE

Supreme Court of the United States

October Term, 1981

UNITED BUILDING AND CONSTRUCTION TRADES COUNCIL OF CAMDEN COUNTY AND VICINITY,
Petitioner,

v.

MAYOR and COUNCIL OF THE CITY OF CAMDEN and THE DEPARTMENT OF THE TREASURY OF THE STATE OF NEW JERSEY,
Respondents.

On Appeal From the Supreme Court of New Jersey

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a municipal affirmative action ordinance, which requires, in part, that 40% of the workers in public works construction contracts be city residents, is designed to alleviate the social and economic hardships of the citizens of the municipality, and does not bar employment opportunities for residents of neighboring states, violates the Commerce, Privileges and Immunities, or Equal Protection Clauses of the U. S. Constitution.

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Petitioner,

v.

MAYOR and COUNCIL OF THE CITY OF CAMDEN and THE DEPARTMENT OF THE TREASURY OF THE STATE OF NEW JERSEY,
Respondents.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

BRIEF IN OPPOSITION

Petitioner brought this action to appeal that portion of the final judgment of the Supreme Court of New Jersey, dated February 18, 1982, upholding the validity, under the United States Constitution, of a municipal ordinance passed by the City of Camden, and approved by the State of New Jersey, which requires that at least 40 percent of the employees hired by private contractors engaged in public works construction projects for the City be municipal residents for one year prior to employment. This Brief in Opposition is submitted to demonstrate that the New Jersey Supreme Court correctly interpreted the United States Supreme Court's prior decisions in upholding the validity of this ordinance and that the Petitioner has failed to show a sufficient basis, as indicated in U. S. Sup. Ct. Rule 17, 28 U. S. C. A., for this Court to review the lower court's decision.

OPINION BELOW

The opinion of the Supreme Court of New Jersey, dated February 18, 1982 is reported at 88 N. J. 317 (1982), and is reproduced in the Petitioner's Jurisdictional Statement as Appendix A.

JURISDICTION

The judgment of the Supreme Court of New Jersey was entered on February 18, 1982. Petitioner's Notice of Appeal and Jurisdictional Statement was filed within 90 days of that date. Petitioner invokes this Court's jurisdiction under 28 U. S. C. § 1257(2). *See, Erznoznik v. City of Jacksonville*, 422 U. S. 205, 207 n. 3 (1975).

CONSTITUTIONAL PROVISIONS, ORDINANCE AND STATUTE INVOLVED

United States Constitution, Article IV, § 2, Cl. 1:

> "The citizens of each State shall be entitled to all the Privileges and Immunities of Citizens in the several States."

United States Constitution, Article I, § 8, Cl. 3:

> "The Congress shall have Power . . . to regulate Commerce . . . among the several States . . ."

United States Constitution, Fourteenth Amendment, § 1:

> "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

The Ordinance of the City of Camden at issue is set forth in its entirety as Appendix C in the Petitioner's Jurisdictional Statement. In relevant part, it states:

> "WHEREAS, the City Council of the City of Camden recognizes its legal and moral obligation to promote and preserve the economic well-being of all citizens of the City of Camden; and
>
> WHEREAS, the City Council of the City of Camden in viewing the present economic conditions which confront minority citizens within the City of Camden and said minority citizens make up a significant portion of the population of the City of Camden; and
>
> WHEREAS, the present economic conditions nationwide do affect, in an adverse fashion, the economic well-being and status of minority citizens of the City of Camden in such a way as to elevate the amount of unemployment within the City of Camden above the levels that exist County-wide and State-wide; and
>
> WHEREAS, the City Council of the City of Camden has been informed that unemployment State-wide is

8.1% and County-wide is 7.6%. The unemployment figures for the City of Camden, as given to the City Council by the Department of Labor of the United States, are 11.5%. However, at the last figures recorded by the State of New Jersey Department of Labor Affirmative Action Office, unemployment among Black Americans was 18.4% and unemployment among Hispanic-Americans was 15.6%. The latter figures as to Black and Hispanic unemployment were as of the end of 1977 and the Department of Labor has informed the City Council of the City of Camden that these particular figures have increased significantly making the problem of unemployment even more grave, than that which existed when the figures were compiled; and

WHEREAS, the City Council of the City of Camden, by the adoption of an Affirmative Action Program, seeks to relieve the problem of unemployment among its residents and citizens and seeks to promote the growth of minority involvement in construction and obtaining contracts for minority-owned businesses; and

WHEREAS, the City of Camden, in concert with the State of New Jersey and the Federal Government, supports the concept of seeking to grant a definite portion of all construction trade-related contracts and jobs, funded by local, state and/or federal monies, to minority contractors and employees; now, therefore BE IT ORDAINED by the City Council of the City of Camden, as follows:

II. *Applicability of Ordinance*

Wherever the City of Camden spends funds derived from any public source for construction contracts or where the City of Camden confers

a direct financial benefit upon a party, but excluding the grant of a property tax abatement, the fair market value of which exceeds $50,000.00, the provisions of this ordinance shall apply . . . The provisions of this ordinance shall also apply to the development and construction of all residential housing of four (4) units or more.

C. IV. *Developer/Contractor's Contracting Obligations*

b. The developer/contractor, in hiring for jobs, shall make every effort to employ persons residing within the City of Camden but, in no event, shall less than forty per cent (40%) of the entire labor force be residents of the City of Camden.

I. *Definitions*

5. Resident of the City of Camden is any person who has been domiciled in the City of Camden for a continuous period of twelve (12) consecutive months prior to the application for employment and continues as a domiciliary of the City of Camden during the term of employment or contract. For the purpose of this ordinance a resident must be a domicile (sic) of the City of Camden expressing an intention to make this City his permanent place of residence."

This municipal ordinance was approved by the Chief Affirmative Action Officer of the Department of the Treasury, State of New Jersey, acting pursuant to N. J. S. A. 10:5-32 and 36(c) and N. J. A. C. 17:27-6.5.[1]

1. Petitioner's Jurisdictional Statement, A62-63 (hereinafter App. ——).

STATEMENT OF THE CASE

A. Factual History

Respondents ("the City") seek to oppose Petitioner's request for review of a judgment of the Supreme Court of New Jersey (Petitioner's Jurisdictional Statement, A1-32) upholding a Camden ordinance which requires that 40% of the workers of public works construction contracts for the City be city residents.[2]

The City of Camden is located in Southern New Jersey, across the Delaware River from Philadelphia. The total population of Camden, as reported by the 1980 census, is 84,910.[3] This number represents a marked decline from the 102,551 figure reported in the 1970 census.[4] During that same ten year period, unemployment increased from 6.3%[5] in 1970 to 10.3%[6] in 1980. These figures clearly indicate that the City of Camden has been subjected to the same type of social and economic decline that has plagued many of the major urban areas of the United States. Once considered the political and social capitol of South Jersey, the City has been fighting a constant battle with the major urban problems of high unemployment, increasing crime, and the flight of business to more attractive areas.

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2. Camden Revised Ordinances, MC #1653, § C.IV, ¶ b.

3. Source: 1980 Census of Housing and Population, U. S. Department of Commerce, Bureau of the Census. Issue Date: March, 1981.

4. Source: 1970 U. S. Census, PAC (1)-159, table P-2, pp. 85-92. U. S. Department of Commerce, Bureau of the Census.

5. Source: 1970—Office of Demographic and Economic Analysis, Bureau of Labor Force Statistics, Division of Planning and Research, N. J. Department of Labor.

6. Source: 1980—"New Jersey Employment and the Economy," Division of Planning and Research, N. J. Department of Labor.

In an effort to promote community pride in its public works construction projects, increase employment opportunities for its citizens, and improve the economic position of its citizens, the City enacted City Ordinance MC-1650, entitled "An Ordinance To Establish An Affirmative Action Program In Connection With Construction Contracts To Be Performed For Or On Behalf Of The City of Camden."[7] This ordinance was further amended by MC-1653, which contains the challenged 40% residency requirement.[8] The ordinance also provides for a minority hiring goal of 25%. That provision is not in dispute in this appeal.

The express purpose of the ordinance is to "preserve the economic well-being of all citizens of the City of Camden,"[9] . . . "relieve the problem of unemployment among its residents and citizens and . . . promote the growth of minority involvement in construction."[10]

In enacting this ordinance, Camden City Council carefully considered the official unemployment statistics compiled by the Department of Labor of the United States and the New Jersey Department of Labor Affirmative Action Office.[11] Those statistics revealed that unemployment in the City exceeds both the national and state unemployment rates. Moreover, since the national unemployment rates for blacks and Hispanics were both greater than double the overall national unemployment rate,[12] and

7. App. 36-53.

8. App. 54-58.

9. App. 36, ¶ 1.

10. *Id.* at ¶ 5.

11. App. 36-37.

12. The national unemployment rate for 1980 was 7.1%. Source: "Employment and Earnings," L-2.41/2.28/1, U. S. Department of Labor, Bureau of Labor Statistics, Date: January, 1981. The unemployment rates for Black-Americans and Hispanic-Americans is contained in the preamble to Ordinance MC-1650, and reported at App. 36-37.

since these two groups comprise more than 70% of the City's total population,[13] it follows that the City's unemployment picture is even more dismal than the official statistics suggest.

B. Procedural History

The ordinance was enacted pursuant to the 1975 amendments to the New Jersey Law Against Discrimination. L. 1975, C. 127, *N. J. S. A.* 10:5-31 to 38. The relevant section of that statute, N. J. S. A. 10:5-36(c), authorizes state and local agencies to design their own affirmative action programs to meet local needs and submit them to the State Treasurer for approval. Upon approval, that program will then effectively serve the same function as the State Affirmative Action Program.

The City designed such a program which was accordingly approved by the Chief Affirmative Action Officer of the New Jersey Treasury Department on November 24, 1980.[14] Petitioner challenged both the constitutionality of the ordinance and the administrative procedure by which it was approved. Petitioner filed an appeal with the New Jersey Superior Court, Appellate Division. On June 19, 1981, the New Jersey Supreme Court accepted the appeal by direct certification, pursuant to New Jersey Court Rule 2:12-1. On February 19, 1982, the Court unanimously upheld the constitutionality of the City ordinance as well as the validity of the administrative approval procedure.[15]

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13. The New Jersey Supreme Court noted that "the black population represents 53.0% of Camden City . . ." and "19.2% of Camden City residents identify themselves as being of Hispanic origin." App. 10.

14. App. 60.

15. App. 21.

MEANING OF THE DECISION BELOW

The court held that the ordinance did not violate either the Privileges and Immunities, Commerce, or Equal Protection Clauses of the U. S. Constitution.[16]

The court ruled that the ordinance did not violate the Privileges and Immunities Clause since it affected more state residents than non-residents.[17] In determining whether the Privileges and Immunities Clause could bar the City ordinance, the New Jersey high court looked to the specific purpose of the clause as expressed in the Constitution, and interpreted by this Court, most recently in *Hicklin v. Orbeck*, 437 U. S. 518 (1978). Since the ordinance did not "aim primarily at out-of-state residents" [18] but only placed them on the "same footing" [19] with other New Jersey residents, the Court determined that it did "not violate any privilege of state citizenship." [20]

This holding is *not* a *redefining* of the Privileges and Immunities Clause, as Petitioner contends, but is merely an application in accord with this Court's interpretation of Article IV, Section 2 of the Constitution. Even though some non-residents may be affected, the crucial factor is that any potential burden is assumed by more New Jersey residents than non-New Jersey Residents.

The ordinance was also upheld by the court in the face of a Commerce Clause challenge. While again using the language and analysis of this Court, the lower court felt that since the City was merely assuming the role of a *market participant* rather than a *market regulator*, it

16. App. 22-28.

17. App. 26.

18. *Id.*

19. *Hicklin*, 437 U. S. at 524.

20. App. 26.

should be immune from Commerce Clause analysis.[21] The court followed its own case law, which was fashioned after this Court's ruling in *Alexandria Scrap, supra,* and *Reeves, Inc. v. Stake,* 447 U. S. 429 (1980), in deciding that the City should be entitled to "favor its own citizens and choose the parties with whom it will deal."[22]

The court determined that since the City is not regulating the flow of commerce between private parties in the national marketplace,[23] it is not, in fact, a market regulator.[24]

Petitioner nevertheless contends that the City is regulating the hiring practices of private employers and should be subject to Commerce Clause analysis as a market regulator. This contention is without merit. Although Petitioner may choose to avoid the hiring requirements of the ordinance by refusing to pursue public works contracts with the City, this should not automatically subject the ordinance to Commerce Clause scrutiny. In addition, Petitioner has failed to support its claim that the ordinance places an impermissible burden on either Petitioner individually or the national marketplace.

The Court should also keep in mind that denial of certiorari in the present case will not reflect on the Court's decision to review *Mass. Council of Construction Employers, Inc. v. Mayor of Boston,* — U. S. —, 425 N. E. 2d 346 (1981), *cert. granted sub nom. White v. Mass. Council of Construction Employees,* 102 S. Ct. 1273 (No. 81-1003, 1982). The social and economic conditions of the City

21. *See Hughes v. Alexandria Scrap, Inc.,* 426 U. S. 794 (1976).

22. App. 23-24. *See K. S. B. Tech. Sales v. North Jersey Dist. Water Supply,* 75 N. J. 272, 298, 381 A. 2d 774, 787 (1977).

23. *See H. P. Hood & Sons, Inc. v. DuMond,* 336 U. S. 525, 539 (1949).

24. App. 22.

of Camden are sufficiently different from the Boston situation to allow this Court to treat the cases separately and affirm the decision of the New Jersey Supreme Court.

The New Jersey Court also held that since there is no infringement on the fundamental right to travel, as recognized in *Shapiro v. Thompson*, 394 U. S. 618 (1969), the ordinance did not violate the Equal Protection Clause.[25] The Court likened the ordinance to residency requirements for municipal employees, *see McCarthy v. Philadelphia Civil Service Commission*, 424 U. S. 645 (1976), and found a rational relationship between the residency requirement and the advancement of the City's public welfare.[26]

The court also followed Supreme Court precedent in rejecting the notion of a fundamental right to work. *See Massachusetts Board of Retirement v. Murgia*, 427 U. S. 307 (1976). Since there is no fundamental right involved, and since a rational relationship exists between the residency requirement and the advancement of the City's public welfare, the court concluded that the ordinance does not violate the Equal Protection Clause.[27]

25. App. 27.

26. *Id.*

27. App. 28.

ARGUMENT

I. The New Jersey Supreme Court Correctly Held That the Camden Ordinance Is Immune From Privileges and Immunities Analysis Since the Ordinance Affects More In-State Residents Than Out-of-State Residents

In upholding the City's residency requirement for workers in public works construction contracts, the New Jersey Supreme Court correctly ruled that the Privileges and Immunities Clause "is not invoked to strike down local ordinances that favor city residents."[28] That court's decision reflects the traditional application of the Privileges and Immunities Clause by the Supreme Court. This Court recognized early that the purpose of the Privileges and Immunities Clause is "to place the citizens of each state upon the same footing with citizens of other states, so far as the advantages resulting from citizenship in those states are concerned." *Hicklin v. Orbeck, supra,* 437 U. S. at 524 quoting *Paul v. Virginia,* 75 U. S. (8 Wall.) 168, 180 (1869). For this reason, Petitioner's request for certiorari on these grounds must be dismissed.

The present case does not offer the type of discrimination which the Privileges and Immunities Clause was intended to proscribe. Indeed, the New Jersey Supreme Court noted that the ordinance not only places New Jersey residents on the "same footing" as non-New Jersey residents, but ". . . most certainly affects more New Jersey residents not living in Camden than it does out-of-state residents."[29] Petitioner has failed to establish facts to dispute this finding.

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28. App. 26.

29. *Id.*

Similarly, the Supreme Court for the Commonwealth of Massachusetts held that an executive order requiring no less than 50% of the workers on public works contracts be Boston residents was not violative of the Privileges and Immunities Clause. *Mass. Council of Construction Employers, Inc. v. Mayor of Boston, supra.* The underlying rationale of this ruling was that "the discrimination adversely affects citizens of the Commonwealth as well." *Id.* at 354.

In light of this concurrence in constitutional interpretation by the Supreme Judicial Courts of New Jersey and Massachusetts, Petitioner has failed to meet its burden of establishing a conflict between higher courts. *See* U. S. Supreme Court Rule 17, 28 U. S. C. A. Moreover, the cases cited by Petitioner may be distinguished on several grounds. Those cases involve either an absolute bar imposed by localities upon non-residents,[30] a state law that offers an absolute preference to state residents, or a state law which places an impermissible burden upon non-residents.[31] The City of Camden Affirmative Action Ordi-

30. *Ward Baking Co. v. City of Fernandina*, 29 F. 2d 789 (S. D. Fla. 1928) (ordinance directing non-resident bakeries delivering within the city to pay a higher license tax than resident bakeries); *State v. Mercer*, 132 Md. 263, 103 Atl. 570 (1918) (higher licensing fees imposed only on non-residents); *State v. Nolan*, 108 Minn. 170, 122 N. W. 255 (1909) (city ordinance excluding bona fide residents from provisions of regulations on peddlers); *Commonwealth v. Snyder*, 182 Pa. St. 630, 38 Atl. 356 (1897) (peddlers license fee not imposed on county residents); *Graffty v. City of Rushville*, 107 Ind. 502, 8 N. E. 609 (1886) (license ordinance which applied only to peddlers who are non-city residents and to goods manufactured outside of the county); *cf., Construction and General Laborers Union Local 563 v. City of St. Paul*, 270 Minn. 427, 134 N. W. 2d 26 (1965) (local ordinance requiring all municipal contractors to employ only county residents).

31. The following cases all represent instances of state laws which have been struck down for impermissibly discriminating

nance fits into none of these categories. Although the Camden ordinance has the effect of giving a limited preference to Camden residents, it does not absolutely bar the participation of either non-Camden or non-New Jersey residents. The ordinance actually provides that up to 60% of the employment opportunities generated by public works construction contracts, may be filled by non-Camden residents, both in-state and out-of-state.

Petitioner relies mainly upon the Supreme Court's recent ruling in *Hicklin v. Orbeck, supra,* in which Alaska's across-the-board hiring statute was found violative of the Privileges and Immunities Clause. The absolute bar on out-of-state residents found in *Hicklin* does not exist in the Camden ordinance. Hence, this Court's analysis in that instance is inapplicable in the present case. Petitioner has further failed to provide additional authority

31. (Cont'd.)

against an out-of-state resident's involvement in the commercial fishing industry, *see e.g. Toomer v. Witsell,* 334 U. S. 385 (1948); *Mullaney v. Anderson,* 342 U. S. 415 (1952); *Brown v. Anderson,* 202 F. Supp. 96 (D. Alaska 1962); *Gospodnovich v. Clements,* 108 F. Supp. 234 (E. D. La. 1951), *app. dismissed,* 344 U. S. 911 (1953); *Edwards v. Leaver,* 102 F. Supp. 698 (D. R. I. 1952); marketing of produce, *Ward v. Maryland,* 79 U. S. (12 Wall.) 418 (1871); employment on oil and gas pipelines, *Hicklin v. Orbeck, supra;* ferry boat engineer officer, *District No. 1 Pacific Coast District, M. E. B. A. v. Ward,* 505 F. Supp. 98 (W. D. Wash. 1981) and public works construction, *Salla v. County of Monroe,* 48 N. Y. 2d 514, 399 N. E. 2d 909, 423 N. Y. S. 2d 878 (1979), *cert. denied sub nom. Abrams v. Salla,* 446 U. S. 909 (1980); *Neshaminy Constructors, Inc. v. Krause,* 181 N. J. Super. 367, 437 A. 2d 733 (Ch. Div. 1981); admission to the bar, *Stallard v. South Dakota Board of Bar Examiners,* 530 F. Supp. 155 (D. S. D. 1982); *Strauss v. Alabama State Bar,* 520 F. Supp. 173 (N. D. Ala. 1981); *Sheley v. Alaska Bar Association,* 620 P. 2d 640 (Alaska 1980); *Gordon v. Committee on Character and Fitness,* 48 N. Y. 2d 266, 397 N. E. 2d 1309, 422 N. Y. S. 2d 641 (1979).

which would support its demand for Supreme Court review on this issue.

There is no factual basis, either in the record or established by Petitioner in its brief, to rebut the clear and obvious intent of the Camden ordinance not to discriminate against out-of-state residents. Respondents urge that the holding of the New Jersey Supreme Court must stand. Petitioner has failed to establish any high court decisions which conflict with the New Jersey and Massachusetts Courts on these facts. Therefore, Respondents request that the Petition for Certiorari be denied. The question raised by Petitioner is one that has been conclusively resolved by recent decisions. It does not merit review by our highest Court.

II. The Camden Ordinance Does Not Violate the Commerce Clause.

A. The New Jersey Supreme Court Correctly Viewed the City as a Market Participant and the Ordinance Is Therefore Immune From Commerce Clause Scrutiny.

The New Jersey Supreme Court held that since "the City of Camden is not regulating the flow of commerce between private parties . . . [it] is acting in the role of market participant, not market regulator." [32] In establishing the "market participant" concept, this Court stated that "the Commerce Clause responds principally to state taxes and regulating measures impeding free private trade in the national market place." *Hughes v. Alexandria Scrap*, 426 U. S. at 807-808. The Camden ordinance represents no such tax or regulatory measure, nor has Petitioner shown an impermissible burden on interstate trade.

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32. App. 22.

The state program in *Alexandria Scrap*, *supra*, was designed to remove abandoned automobiles from the state's roadways and junkyards, and "imposed more exacting documentation requirements on out-of-state than in-state processors." *Reeves, Inc. v. Stake*, 447 U. S. at 434. In *Reeves*, the state-owned cement plant "reaffirmed its policy of supplying all South Dakota customers first and to honor all contract commitments, with the remaining volume allocated on a first come, first served basis." *Id.* at 432. Camden's ordinance is certainly much less rigid than the two programs described above. Yet this Court ruled that both Maryland and South Dakota were merely acting as market participants and, as such, were entitled to make demands that would otherwise have been impermissible for a governmental entity acting in a regulatory capacity.

The City, like the states of Maryland and South Dakota, has assumed a proprietary capacity[33] but, unlike those states, continues to offer commercial opportunities to out-of-state construction firms. As this Court stated in *Perkins v. Lukens Steel Co.*, 310 U. S. 113 (1940), "[l]ike private individuals and businesses, the Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases." *Id.* at 127. The Court continued this policy in *Alexandria Scrap*, *supra*, and concluded "[n]othing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional

33. *See also American Yearbook v. Askew*, 339 F. Supp. 719 (N. D. Fla. 1972) (three-judge District Court upholding a Florida statute requiring the State to obtain needed printing services from in-state shops. "[S]tate proprietary functions" are exempt from Commerce Clause scrutiny. *Id.* at 725. This Court affirmed summarily, 409 U. S. 904 (1972).

action, from participating in the market and exercising the right to favor its own citizens over others." *Id.* at 810.

Petitioner maintains that the Camden ordinance regulates the hiring practices of private contractors. This is a misapplication of the market participant/regulator concept as well as a misinterpretation of the ordinance. The City has not established inflexible hiring regulations for private construction firms, as Petitioner contends, but merely requires that contractors show a preference towards Camden residents when the project is substantial and is located in the City of Camden. By establishing a minimum cost requirement of $50,000, the City has focused only on those projects which would involve additional work crews, and which should not affect *steady hands*. Keeping in mind that the *regular* employment of construction firms often varies with the number and size of their projects, the City simply requires that these firms employ some Camden residents when additional workers are needed. The ordinance is a reasonable compromise: it does not preclude the employment of out-of-state residents and it does, indeed, serve a valid public purpose.

In addition, the fact that the Respondents in *Alexandria Scrap*, *supra*, and the Petitioner in *Reeves*, *supra*, suffered substantial hardship [34] had little or no effect in the Court's determination that the respective states were market participants. In both cases the Court followed the principal that the Commerce Clause "protects the interstate market, not particular interstate firms. . . ." *Exxon*

34. The Respondent in *Alexandria Scrap* submitted an affidavit which showed that in the six months following the effective date of the amendment, the Respondent had received 31.8% fewer bounty-eligible hulks than during the six months preceding the effective date of the amendment. 426 U. S. at 801 n. 11. The Petitioner in *Reeves*, after being turned away by the South Dakota cement plant, was forced to cut production by 76%. 447 U. S. at 432.

Corp. v. Governor of Maryland, 437 U. S. 117, 127 (1978). The Petitioner in the present case has provided no evidence of hardship with respect to the interstate market or to Petitioner itself. In short, this is not "the kind of action with which the Commerce Clause is concerned." *Hughes v. Alexandria Scrap*, 426 U. S. at 805.

B. The Court's Denial of Certiorari in the Present Case Will Not Conflict With the Court's Grant of Certiorari in *Mass. Council of Construction Employers, Inc. v. Mayor of Boston* Since the Facts Surrounding the Boston Executive Order and the Camden Ordinance Are Substantially Different for Purposes of Commerce Clause Analysis.

The Supreme Court has granted certiorari to *Mass. Council of Construction Employers, Inc. v. Mayor of Boston, supra, cert. granted sub nom. White v. Mass. Council of Construction Employees*, — U. S. —, 102 S. Ct. 1273 (No. 81-1033, 1982). The Massachusetts Supreme Court compared the Boston Executive Order and the factual record before it with the Court's analysis of the Commerce Clause in prior judicial decisions.[35] As reflected in the authorities cited in § II (A), *supra*, Commerce Clause analysis requires a pairing of the facts of each case with the aim of the Commerce Clause.

The court in *Mass. Council, supra*, relied on a statement of agreed facts in determining that a significant impact would be felt by the interstate construction firms.[36] The present case offers no such agreement or record of injury to any of the interested parties. Commerce Clause review by this Court would therefore be limited to review

35. *See Philadelphia v. New Jersey*, 437 U. S. 617 (1978), *Hicklin v. Orbeck, supra, Reeves, Inc. v. Stake, supra.*

36. 425 N. E. 2d 354.

of the Camden ordinance on its face. (See Procedural History under STATEMENT OF THE CASE.) Consequently, the decision to deny or grant certiorari in the present case must be based upon a full analysis of the factors set forth in § I (A), *supra*. Thus, the granting of certiorari in *Mass. Council*, *supra*, should not be viewed by Petitioner as a *carte blanche* reason for this Court to grant certiorari in the present case.

A further distinction between the two cases is that the $50,000 minimum cost requirement allows for the hiring of additional employees on major construction sites. The Boston order, however, requires a minimum hiring requirement of Boston residents on all construction projects within the city.[37]

Moreover, the Massachusetts court held that the order was overly broad for its express purposes. The Court stated:

> "the extensive preference for local residents contained in the executive order cannot come within the exception outlined by *Reeves* because it sweeps so broadly. In *Reeves*, the existence of a genuine shortage of concrete necessitated some form of rationing. The State's choice of favoring its own citizens was a rational means of allocation which recognized the special interests of local taxpayers."[38]

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37. The relevant portion of the mayor's order is as follows: "(1) On any construction project funded in whole or in part by City funds, or funds which, in accordance with a federal grant or otherwise, the City expands or administers, and to which the City is a signatory to the construction contract, the worker hours on a craft-by-craft basis shall be performed, in accordance with the contract documents established herewith, as follows: "a. at least 50% by bona fide Boston residents". 425 N. E. 2d at 347-348 n. 4.

38. *Id.* at 355.

Similarly, the Camden ordinance should be viewed as a rational means to combat its profound unemployment problem. The City is not passing judgment on either the propriety of the Boston executive order or the decision of the Massachusetts Supreme Court, but given the high rate of unemployment in Camden, with no sign of future relief, the City's ordinance is the most reasonable approach to deal with this unique situation. The City submits that the particularities of the extreme circumstances in Camden should clearly distinguish the present case from the Massachusetts case.

This distinction is illustrated by the following statistics. Unemployment in Boston in 1980 was recorded at 6.2%.[39] The unemployment rate in Camden in that same year was 10.3%.[40] The population in Boston in 1980 was recorded at approximately 563,000 residents, with blacks and Hispanics comprising approximately 163,000 or 29% of the total population.[41] The black and Hispanic population in Camden, as noted above, is more than 70% of the total population. With the national unemployment rates for blacks and Hispanics more than double the national rate, it is clear that an Affirmative Action Program is necessary in Camden. Therefore, this Program should fall within the exception outlined by *Reeves*, *supra*, and the ruling of the New Jersey Supreme Court should be upheld.

For the foregoing reasons, the City respectfully submits that (1) Petitioner has not sustained its burden of showing sufficient reason for this Court to review the

39. Source: Massachusetts Division of Employment Security, Labor Area Research Department.

40. *See* STATEMENT OF THE CASE.

41. Source: 1980 Census of Housing and Population, U. S. Department of Commerce, Bureau of the Census.

New Jersey Supreme Court's ruling, and (2) the unemployment situation in Camden is substantially different from that in Boston to allow this Court to dismiss the present case without reflecting on its prior grant of certiorari in the Massachusetts case.

It is also respectfully submitted that the present case would be distinguishable from any affirmance of *Mass. Council, supra.* Alternatively, if *Mass. Council, supra,* is reversed, then the New Jersey Supreme Court decision would still be in accord with that ruling.

III. The New Jersey Supreme Court Correctly Held That the Camden Residency Requirement Does Not Violate the Equal Protection Clause Since It Does Not Impermissibly Burden the Right to Interstate Travel.

The New Jersey Supreme Court rejected Petitioner's claim that the Camden ordinance impermissibly burdens the fundamental right to interstate travel. *See, e.g. Shapiro v. Thompson, supra.* The court likened the durational residency requirement to the type of bona fide residency requirement that this Court upheld in *McCarthy v. Philadelphia Civil Service Commission, supra.* And since the "right to employment on a local public works project . . ."[42] is not a fundamental right, the New Jersey court concluded that the rational relationship between the residency requirement and the need for economic revitalization is sufficient for upholding the ordinance. *Allied Stores of Ohio v. Bowers,* 358 U. S. 522, 528 (1959).

Petitioner contends that the court's ruling ignored this Court's recognition of the fundamental right to interstate travel in *Shapiro v. Thompson, supra.* For purposes of Equal Protection analysis, however, the cases relied on by Petitioner are significantly different from the present

42. App. 28.

case. *See Shapiro, supra; Dunn v. Blumstein*, 405 U. S. 330 (1972); *Memorial Hospital v. Maricopa County*, 415 U. S. 250 (1974). The Camden ordinance, while requiring 40% employment of those individuals who have resided in Camden for 12 months or longer, does not involve the absolute durational residency requirement of the aforementioned cases. As discussed above, the ordinance still provides as much as 60% employment opportunities to non-Camden residents. Thus, it does not follow that this ordinance requires a person to choose between travel and access to employment opportunities. *Dunn*, 405 U. S. at 342. In short, the ordinance does not "penalize citizens for exercising their constitutional right to travel." *Jones v. Helms*, 452 U. S. 412, 420-421 (1981).

It should be emphasized that the New Jersey Supreme Court did not ignore the difference between durational and bona fide residency requirements, but merely recognized that this case was not subject to a durational residency type of analysis. Since no fundamental right was jeopardized, the New Jersey court correctly ruled that the Camden ordinance does not offend the Equal Protection Clause of the Fourteenth Amendment.

Petitioner also acknowledges that this Court has upheld durational residency requirements, *see, e.g., Sosna v. Iowa*, 419 U. S. 393 (1975) when the government service requested is not a "basic necessity of life." *Memorial Hospital v. Maricopa County*, 415 U. S. at 259. Petitioner then asserts, without any factual or case support, that public employment is a *basic necessity of life* and is thus more akin to non-emergency medical care or welfare assistance than to divorce. For constitutional analysis, however, Petitioner should be expected to offer something more substantial than mere assertions equating public employment with welfare assistance. As this Court

wrote in *Sosna*, the common element of *Shapiro*, *Dunn*, and *Maricopa County*, "was that the durational residency requirements they struck down were justified on the basis of budgetary or record keeping considerations which were held insufficient to outweigh the constitutional claims of the individuals." *Sosna v. Iowa*, 419 U. S. at 406.

Moreover, the City's residency requirement, like "Iowa's residency requirement may reasonably be justified on grounds other than purely budgetary considerations or administrative convenience." *Id.* at 407; *cf. Kahn v. Shevin*, 416 U. S. 351 (1974). The severity of the unemployment problem in Camden, as recognized by the New Jersey Supreme Court in *City of Camden v. Skokowski*, 88 N. J. 304, 441 A. 2d 741 (1982), required that some action be taken to alleviate Camden's dire situation. The Camden City Council, in responding to this need, enacted the challenged ordinance for the social and economic advancement of its citizens while still providing employment opportunities for non-residents. And, unlike in *Sosna, supra*, where non-residents faced a delay in the administration of government services, non-residents in the present case are not subject to any waiting period.

In addition, the Camden ordinance does not "irretrievably [deprive] all residents who have lived in Camden less than a year of the opportunity to pursue their chosen livelihood."[43] Petitioner again fails to support this assertion. These *non-residents* do, in fact, enjoy access to employment opportunities generated by the public works construction contracts.

Moreover, the fact that unemployment is a national problem does not preclude municipalities from invoking their police power to deal with serious individual problems. The City recognizes that a State is not able "to

43. Petitioner's Jurisdictional Statement at 44.

isolate itself from the difficulties common to all of them by restraining the transportation of persons and property across its borders." *Edwards v. California*, 314 U. S. 160, 173-174 (1941). But the City ordinance results in no such restriction. It is a reasonable compromise which offers employment opportunities to non-residents while attending to its local needs.

In the absence of any tangible evidence supporting the contentions that the Camden City Council has overreached its powers in enacting this ordinance, and that the New Jersey Supreme Court's decision is contrary to this Court's decisions, the City respectfully submits that this ruling should be upheld and should not be granted review by this Court.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Court deny certiorari in the present case. Petitioner has failed to establish a sufficient basis for review. However, Respondent respectfully reserves the right to submit a brief presenting a full discussion of the issues if this Court does grant certiorari.

Respectfully submitted,

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